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NO.

IN THE

Supreme Court of the United States

October Term, 1988

LUCIOUS WILLIAMS, et al.,
Petitioners,

vs.

EARL BUTZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether The Housing And Community Development Amendments of 1978, Which Required The FmHA To Assure A Hearing To Those Recipients Whose Housing Assistance Would Be Terminated, Brought The Terms Of A 1977 Consent Decree, Which Permitted The FmHA To Foreclose Only In Judicial Proceedings, Into Conflict With Statutory Objectives?

II. Whether, Where Modification Of A Consent Decree Is Premised On Subsequent Legislation, The Modification Should Be Permitted Only When It Clearly Appears That Congress Has Changed Applicable Public Policy.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were as follows:

Plaintiffs-Appellees

LUCIOUS WILLIAMS, JR., ALLIE D. WILLIAMS, SUSIE H. COLEMAN (ROSS), EVANS W. GLASS, VIRGINIA W. GLASS, and MYRA CHANCE OWENS on behalf of themselves and all others similarly situated.

Defendants-Appellants

EARL BUTZ, Individually and in his capacity as Secretary of the United States Department of Agriculture; CHARLES E. KILGORE, JR., Individually and in his capacity as Acting State Director for Georgia, Farmers Home Administration, United States Department of Agriculture; LARRY ASKEW, Individually and his capacity as

District Director, Farmers Home Administration, United States Department of Agriculture; and ALPHONSO ANDREWS, Individually and in his capacity as County Supervisor, Burke County, Georgia, Farmers Home Administration, United States Department of Agriculture.

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No.

In The Supreme Court of the United States
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LUCIOUS WILLIAMS, et al.,
Petitioners,

vs.

EARL BUTZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners, Lucious Williams, Jr., et al., on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 3, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Williams v. Butz, 843 F.2d 1335 (11th Cir. 1988). Petitioners' suggestion for rehearing in banc was denied by the Court of Appeals without opinion on June 23, 1988, and is not yet reported.

The district court's decision on the merits was entered on December 9, 1986, and is unreported. Orders of the district court dated December 9, 1986 and October 7, 1977, the judgment and opinion of the Court of Appeals for the Eleventh Circuit on the merits, and the Court of Appeals judgment on the suggestion for rehearing in banc are included in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 3, 1988 and the order denying Petitioners'

suggestion for rehearing in banc was entered on June 23, 1988. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' denial of the suggestion for rehearing in banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

United States Const., Amend. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1472:

Terms of loan.

(a) If the Secretary determines that an applicant is eligible for assistance as provided in section 1471 of this title and that the applicant has the ability to repay in full the sum to be loaned, with interest, giving due consideration to the income and earning capacity of the applicant and his family from the farm and other sources, and the maintenance of a reasonable standard of living for the owner and the occupants of said farm, a loan may be made by the Secretary to said applicant for a period of not to exceed thirty-three years from the making of the loan with interest. The Secretary may accept the personal liability of any person with adequate repayment ability who will cosign the applicant's note to compensate for any deficiency in the applicant's repayment ability. At the borrower's option, the borrower may prepay to the Secretary as escrow agent, on terms and conditions prescribed by him, such taxes, insurance, and other expenses as the Secretary may require in accordance with section 1471(e) of this title.

Provisions of loan instrument

(b) The instruments under which the loan is made and the security given shall --

(1) provide for security upon the applicant's equity in the farm or such other security or collateral, if any, as may be found by the Secretary reasonably to assure repayment of the indebtedness.

42 U.S.C. §§ 1480 ((d), (g), & (k):

In carrying out the provisions of this subchapter, the Secretary shall have the power to:

* * * * *

(d) collect all claims and obligations arising out of or under any mortgage, lease, contract, or agreement entered into pursuant to this subchapter and, if in his judgment necessary and advisable, to pursue the same to final collection in any court having jurisdiction: ...."

* * * * *

(g) issue rules and regulations which assure that applicants denied assistance under this subchapter or persons or organizations whose assistance under this subchapter is being substantially reduced or terminated are given written notice of the reasons for denial, reduction or termination and are provided at least an opportúnity to appeal an adverse decision and to present additional information relevant to that decision to a person, other than the person making the original determination, who

making the original determination, who has authority to reverse the decision;

* * * * *

(k) make such rules and regulations as he deems necessary to carry out the purposes of this subchapter.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 60(b), Federal Rules of Civil Procedure:

(b) **Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion made under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit

from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Plaintiffs-petitioners are a class of mortgagors residing in Georgia who borrowed funds to purchase their homes from the Farmers Home Administration (FmHA) under Section 502 of the Rural Housing loan program of Title V of the Housing Act of 1949 as amended, 42 U.S.C. § 1472 (1980) (the Act). In 1976, the plaintiffs sued the defendants claiming that the FmHA's use of non-judicial, "power of sale" proceedings in Georgia to foreclose these mortgages did not comport with the Constitution's due

process requirements. This action also challenged the agency's failure to provide borrowers with adequate loan servicing relief required by the Housing Act of 1949, as amended. This action culminated in a consent decree dated October 7, 1977 which, inter alia, permitted the agency to foreclose upon plaintiffs' mortgages only through judicial proceedings.

The posture of the FmHA toward its borrowers is exemplified by the agency's recalcitrance in the face of 42 U.S.C. § 1475, one of the original provisions of the 1949 Act. In that section, Congress provided a moratorium for those borrowers who fell behind in payments due to circumstances beyond their control. Yet, it took the agency over 25 years to implement moratorium relief. Thus, as late as 1976, out of 26,000 rural housing loans outstanding in Georgia, FmHA had only granted this type

of relief in 134 cases. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, RURAL HOUSING ACT OF 1977, HEARINGS ON S. 1150 BEFORE THE SUBCOMMITTEE ON RURAL HOUSING, 95th Cong., 1st Sess. 297-303 (1977) (statement of William J. Cobb).

In his testimony before the Senate Subcommittee, Mr. Cobb, counsel for plaintiffs, set out at length the dismal facts of the FmHA's administration of the moratorium provisions and several other aspects of the loan program. Id. He testified that, in Georgia, FmHA had exhibited a callous attitude toward borrowers who were experiencing financial difficulty and ignorance of the problems they faced. FmHA would not advise borrowers of foreclosure avoidance procedures that were available, arbitrarily refused to consider moratorium requests, and denied moratorium requests without giving borrowers a reason. The

agency had no consistent method of determining when moratorium relief would be granted. Instead, FmHA county supervisors had unfettered discretion, with the result that apparently similar situations would be treated differently from county to county. The appeals procedure was woefully inadequate. There was no requirement that the agency give written notice of an adverse decision; no right to call or to cross-examine witnesses; no requirement that the decision be made on the record; no right to an impartial tribunal; and no right to counsel.

As a result of these hearings and its new awareness of FmHA's practices, Congress enacted Section 503 of the Housing and Community Development Amendments of 1978, now codified at 42 U.S.C. § 1480(g), which amended the Act to require that the Secretary of Agriculture provide notice and an

opportunity to be heard by an impartial decisionmaker to those recipients whose housing assistance the FmHA wished to terminate. Thereafter, the FmHA promulgated regulations which provided its housing assistance recipients with an opportunity for an informal administrative hearing before an FmHA official. 43 Fed. Reg. 219 (Nov. 13, 1978)(codifed as 7 C.F.R. Part 1900).

These regulations have been amended more than once in response to constitutional challenge. For example, after FmHA was criticized in Johnson v. U.S. Department of Agriculture, 734 F.2d 774, 782 (11th Cir. 1984), because its appeal process relied on a subordinate to review the decisions of his superior, FmHA modified its procedure to avoid such blatant conflict of interest. 50 Fed. Reg. 23902 (June 7, 1985), amending 7 C.F.R. §1900.56.

In 1986, the defendants, referencing the 1978 legislation and the agency's promulgation of regulations thereafter, moved the trial court to modify the consent decree in this case to permit defendants to foreclose plaintiffs' mortgages by the old, non-judicial, "power of sale" procedures. In an order dated December 9, 1986, the district court declined to reopen the decree, noting that the defendants had failed to show either the kind of unexpected hardship or oppression which would justify modification of the decree or that the decree was invalid. Defendants filed a notice of appeal on February 5, 1987.

The Court of Appeals reversed, in an opinion dated May 5, 1988. The panel's analysis was based on the rule of System Federation No. 91 v. Wright, 364 U.S. 642 (1961), in which it was held that a district court is free to modify the terms of

the decree when a change in the law brings those terms into conflict with statutory objectives. The appellate court held that the decree conflicted with the Act in that the 1978 amendment demonstrated that Congress intended that the FmHA should have discretion to elect whether to foreclose through judicial or non-judicial processes.

On May 23, 1988, plaintiffs filed a Suggestion of Rehearing In Banc with the Court of Appeals. The Court of Appeals denied that suggestion on June 23, 1988.

Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331, 1337, and 1361.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE HOUSING AND COMMUNITY DEVELOPMENT AMENDMENTS OF 1978, WHICH REQUIRED THE FmHA TO ASSURE A HEARING TO THOSE RECIPIENTS WHOSE HOUSING ASSISTANCE WOULD BE TERMINATED, DO NOT BRING THE TERMS OF A 1977 CONSENT DECREE, WHICH PERMITTED THE FmHA TO FORECLOSE ONLY IN JUDICIAL PROCEEDINGS, INTO CONFLICT WITH STATUTORY OBJECTIVES

A. Background.

In United States v. Swift & Co., 286 U.S. 106 (1932), this Court stated:

> [A]n injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at the time of its making. We are not at liberty to reverse under the guise of readjusting.

Id. at 119. In and since Swift, this Court's focus in a proceeding to modify an equitable decree has been on whether the decree "through changing circumstances has been turned into an instrument of wrong." Id. at 114-15 (emphasis supplied). In System Federation No. 91 v. Wright, 364 U.S. 642 (1961), this Court found such

changed circumstances when post-decree changes in statutory law brought the terms of a consent decree into conflict with the Congressional objective underlying the statutory change.

In System Federation, a defendant union, a defendant railroad company, and 28 individual non-union plaintiffs had agreed in a 1945 consent decree not to operate a union shop. The decree when promulgated was consistent with the Railway Labor Act, which at the time forbade the union shop. In 1951, however, Congress amended that Act to permit railroads to negotiate with unions to establish union shops. As Congress plainly intended by its amendment to increase the freedom of unions and companies to negotiate on this key aspect of the employer-employee relationship, this Court found that the decree had been rendered inequitable and thereby subject to

modification. See, especially, id., 364 U.S. at 652.

B. The Eleventh Circuit Decision.

The Eleventh Circuit incorrectly read the 1978 amendment to the Housing Act as demonstrating that Congress intended the FmHA to be able to employ, in its discretion, non-judicial foreclosure proceedings. In light of its threshold conclusion, the panel invoked the System Federation doctrine to permit modification on the theory that the objectives of the new legislation were in conflict with the terms of the 1978 consent decree. The System Federation doctrine, however, need not have been applied, because the court's assessment of the 1978 legislation was dead wrong.

The Eleventh Circuit did not -- and could not -- support its conclusion that the 1978 amendment was intended to assure the FmHA's discretion to use non-judicial

foreclosure with even a single word or phrase in either the text of the amendment or in its legislative history. To the contrary, careful consideration of both language and legislative history shows plainly that the sole object of the 1978 amendment was to assure notice and hearing for housing aid recipients whom the FmHA wished to terminate.

The new subsection grew out of Congress's concern that the existing FmHA appeals "provisions [we]re seriously deficient in terms both of procedural and substantive due process". S. REP. No. 871, 95th Cong., 2d Sess. 39, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4773, 4812. Even as they were seeking judicial relief from these same deficient provisions, plaintiffs also sought relief from Congress itself, through the testimony of their counsel in a hearing on what ultimately

became the 1978 amendment. SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, RURAL HOUSING ACT OF 1977, HEARINGS ON S. 1150 BEFORE THE SUBCOMMITTEE ON RURAL HOUSING, 95th Cong., 1st Sess. 297-303 (statement of William J. Cobb). Congress responded to the plight of the plaintiffs and others similarly situated by requiring that the FmHA promulgate regulations which would assure a meaningful appeal to those whose assistance the agency proposed to terminate.

Although 42 U.S.C. § 1480(g) is awkwardly worded, as if it were merely a grant to FmHA of the power to issue regulations which assure meaningful appeal, construction of § 1480 as a whole shows that Congress intended only to limit agency discretion. Even prior to the amendment, the Secretary had already been granted the usual, broad discretionary power to promul-

gate rules and regulations. 42 U.S.C.A. § 1480(i)(1978), now 42 U.S.C.A. § 1480(k) (West Supp. 1988). Under this earlier grant, the Secretary certainly had power enough to establish any appeals procedure he wished. Therefore, the new subsection would make no sense if read as intended to increase the Secretary's discretionary authority. To give meaning to Congress's efforts, then, subsection (g) must be read, not as an authorization of meaningful appeal regulations, but as a directive that meaningful appeal regulations be promulgated.

Furthermore, that the 1978 amendment was intended as a requirement to be imposed on the Secretary is clearly stated no fewer than three times in the legislative history of the amendment. S. REP. No. 871, 95th Cong., 2d Sess. 39, 89 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4773, 4812,

4860; H. CONF. REP. No. 1792, 95th Cong., 2d Sess. 88 reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4876, 4908. On the other hand, at no point does the legislative history offer the slightest hint that Congress acted, even in part, for the purpose of assuring that the Secretary would be free to use non-judicial foreclosure.

The evident object of the amendment is to assure that at least some attempt was made to provide a meaningful appeal in all cases, even in States where the Secretary might lawfully proceed by non-judicial foreclosure. True, the amendment is ostensibly consistent with Congressional toleration of non-judicial foreclosure by the FmHA, in its discretion, in States where non-judicial foreclosure is otherwise authorized by law. At the same time, however, the amendment is at least equally consistent with Congressional toleration of

judicial foreclosure by the FmHA, despite the agency's contrary preference, in States where judicial foreclosure is otherwise required by applicable law. This includes the large number of States whose local law requires judicial foreclosure, and it includes Georgia where, a full year before the amendment was enacted, the FmHA had agreed to judicial foreclosure in the consent decree under consideration.

The 95th Congress was not concerned that the Secretary be able to exercise his choice of judicial or non-judicial foreclosure proceedings. To the contrary, the 95th Congress was willing to leave that particular question to other actors, such as the States and the courts. Congress acted only to assure that, regardless of how -- or by whom -- that question would be answered, FmHA housing assistance would not be terminated without a meaningful appeal.

That sole legislative objective is not in conflict with the 1977 consent decree entered into by plaintiffs and the FmHA.

II. THE SUPREME COURT SHOULD CLARIFY THAT WHERE MODIFICATION OF A CONSENT DECREE IS PREMISED ON SUBSEQUENT LEGISLATION, MODIFICATION WILL BE PERMITTED ONLY IF IT CLEARLY APPEARS THAT CONGRESS HAS CHANGED THE APPLICABLE PUBLIC POLICY.

Under Rule 17, Rules of the Supreme Court of the United States, a petition for certiorari must be supported by special and important reasons. Here, this requirement is met by the importance of avoiding confusion in the application of the doctrine of System Federation No. 91 v. Wright, 364 U.S. 642 (1961). An invocation of that doctrine as causal as that in which the Eleventh Circuit engaged threatens to skew the relationship between legislative and judicial powers and is inconsistent with the approach taken by this Court in the System Federation case itself.

In that case, this Court held that an equitable decree must yield to Congressional redirection of public policy, provided only that the new legislative mandate be otherwise constitutional. Respect for the worth and solemnity of its own decrees, however, counsels that the judicial branch conduct an especially cautious inquiry as to whether an intervening legislative change actually does bring an earlier decree into conflict with new statutory objectives. It comes as no surprise, therefore, that this Court went on to expressly observe that Congress had legislated its new policy "in the clearest terms". 364 U.S. at 648. Cf. United States v. Swift & Co., supra, 286 U.S. at 119 (requiring a "clear showing of grievous wrong").

The instant case sharply illustrates the wisdom of a cautious approach. In

those States where non-judicial foreclosure is ordinarily available, the FmHA needs no special grant of discretion to proceed non-judicially. On the other hand, for those States whose law requires judicial foreclosure, Congress could have, but has not, granted FmHA an exception. Thus, the Eleventh Circuit conclusion that Congress, by the 1978 amendment, revealed an intention that FmHA have such discretion would make sense only if Congress pointedly intended to grant such discretion in Georgia, the one state in which judicial foreclosure was required by consent decree rather than by state law.

In effect, the Eleventh Circuit panel read the new legislation as if it were targeted at the very consent decree here in issue. As pointed out in Swift , however, what was "once solemnly adjudicated" should not be "lightly undone", 286 U.S. at 120,

and a court should look doubly hard before finding that its own decree has been overruled by Congressional action. The only standard which will adequately serve the dignity of the judiciary as a coequal branch of government is one premised on a clear demonstration[1] of a relevant change in public policy.

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1. This Court has employed like policies of clear statement in other contexts lying at or near the intersection of Congressional and judicial power. For example, in cases like Rusk v. Cort, 369 U.S. 367 (1962), Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) , and their numerous progeny, this Court has looked for "clear and convincing evidence" before finding a Congressional intent to restrict access to judicial review.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS

Lucious WILLIAMS, Jr., et al.,
Plaintiffs-Appellees,

v.

Earl BUTZ, et al.,
Defendants-Appellants.

No. 87-8094

United States Court of Appeals,
Eleventh Circuit.

May 3, 1988.

Before RONEY, Chief Judge
HATCHETT, Circuit Judge, and
HAND*, Chief District Judge.

RONEY, Chief Judge:

The Farmers Home Administration (FmHA) appeals the denial of its motion to modify a consent decree which required it to use only judicial proceedings to foreclose mortgages on homes purchased under the

* Honorable William Brevard Hand, Chief U.S. District Judge for the Southern District of Alabama, sitting by designation.

Rural Housing loan program of Section 502(a), Title V of the Housing Act of 1949, 42 U.S.C.A. § 1472 et seq. (1980)(the Act). In view of changes in the agency's regulations, which it contends corrected the due process default which led to the consent decree, the agency sought a court ordered modification to permit foreclosure proceedings under the new regulations. Without examining the new regulations, the district court denied relief on the ground that the parties to the consent decree had agreed that modification would be appropriate only in the event that the consent decree was rendered illegal by subsequent court decisions. The court held that the FmHA neither submitted evidence that the decree violated constitutional, statutory or decisional law, which would render it invalid, nor showed "the kind of extreme, unexpected oppression and hardship

which would justify modification of the Court's decree." Because the district court applied the wrong legal principles in refusing to review the proposed modification, we vacate and remand.

This is the latest case in a series that have challenged FmHA foreclosure procedures. See Curry v. Block, 738 F.2d 1556 (11th Cir.1984); Johnson v. U.S. Dept. of Agriculture, 734 F.2d 774 (11th Cir.1984). In 1977, FmHA entered into a consent decree with a class of Georgia residents, represented by Lucious Williams, Jr., who have purchased or will purchase homes under the Act and whose mortgages are or will be held by FmHA. The decree provides that when "foreclosure is still recommended by the United States, it will be processed judicially, and each class member will have the opportunity to raise any legal or equitable defense, including

the affirmative defense of their claim to moratorium or interest credit." The decree also requires that borrowers be made aware of the availability of relief such as moratorium or interest credit at pre-loan interviews, loan closings and after a missed payment. The agency consented to be restricted to judicial foreclosure proceedings after the borrowers complained that nonjudicial methods authorized under Georgia law violated their right to procedural due process.

Congress has since amended the Act, requiring the FmHA to issue regulations giving Section 502 borrowers a right to notice and an impartial administrative hearing before foreclosure. 42 U.S.C.A. § 1480(g). The regulations were promulgated in 1978, and amended several times, most recently in 1985. The 1978 regulations were challenged by a class of Alabama

citizens.

While not deciding the validity of the regulations, this Court in Johnson v. U.S. Dept. of Agriculture, 734 F.2d 774 (11th Cir.1984), ordered a preliminary injunction requiring only judicial foreclosures until the challenge to nonjudicial foreclosures was decided. There was never a judicial determination concerning the validity of nonjudicial foreclosures under the amended regulations in Johnson, because that case was subsequently settled by a consent decree permitting the FmHA to "use nonjudicial foreclosure in Alabama for all Rural Housing borrowers whose accounts are accelerated on or after July 8, 1985."

The Court in Johnson questioned why the FmHA had not requested modification of the Williams decree in light of the regulatory changes that had occurred since the entry of that decree. In September

1986, following the conclusion of the Johnson litigation and the promulgation of the revisions to the FmHA's appeal regulations, the FmHA filed a motion to modify the Williams consent decree, asserting that it was filed in response to this Court's comments in Johnson.

Pursuant to Paragraph 8 of the consent decree, the district court had retained jurisdiction "for the sole purpose of entertaining a motion to modify this order on the grounds that it, or any part of it, is in direct conflict with a specific holding of the United States Supreme Court, the Fifth Circuit, or its successor rendered subsequent to the date of this Order." In our judgment, the district court too narrowly limited its authority to amend the prospective effect of the decree only upon a judicial decision that directly conflicted with it or upon a showing of

hardship by the agency.

Without regard to the terms of the decree, a court acting in equity has inherent power to modify the prospective effect of its decree in response to changed circumstances. See System Federation No. 91 v. Wright, 364 U.S. 642, 646-47, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961); United States v. Swift & Co., 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932); Roberts v. St. Regis Paper Co., 653 F.2d 166, 172 (5th Cir.1981) Unit B). See also Fed.R.Civ.P. 60(b)(5) (court can modify a judgment when it is no longer equitable that the judgment should have prospective application). That a consent decree is contractual in nature does not relinquish a court's power to revise it in the future. Swift & Co., 286 U.S. 106, 52 S.Ct. 460; System Federation No. 91, 369 U.S. 642, 81 S.Ct. 368.

The district court's reaction to the requested modification might well be correct as it might change procedures that would apply to mortgages negotiated prior to the amendments. The Government might not be able to in effect unilaterally change procedures concerning existing mortgages controlled by the consent decree. Two classes of mortgagors are not in the same situation, however: those with mortgages executed after the change in regulations, but before any modification in the consent decree; and those future mortgagors who will purchase homes financed under Section 502(a) of the National Housing Act of 1949 and whose mortgages will be held by FmHA.

The district court's refusal to consider modification of the requirements as to prospective application raises serious constitutional questions about the

ability of a Government official to bargain away the discretionary duties vested in his office that sound rules of construction dictate be avoided if fairly possible. Although the decree expressly mentions only judicial decisions as furnishing a base for modification, it should be read to be a more general reference to changes in the legal status of nonjudicial foreclosure, a reading that is both plausible and consistent with the interests brought to the negotiations by both parties.

The power to modify, however, may only be exercised under the appropriate circumstances. The district court, relying on Roberts v. St. Regis Paper Co., 653 F.2d 166, 174 (5th Cir. Unit B 1981), refused to review the proposed modification because the Government failed to show extreme, unexpected hardship and oppression. See generally Swift & Co., 286 U.S. 106, 119,

52 S.Ct. 460, 464, 76 L.Ed. 999 (1932).

Swift concerned a consent decree entered in 1920 ordering a measure of divestiture by and imposing a variety of restraints upon defendant meat packers. The Supreme Court concluded that the danger of monopoly and elimination of competition which led to the initial Government complaint and the decree had not been removed and there was still a danger of unlawful restraints of trade. The Court held that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" would lead it to change the decree. Swift, 286 U.S. at 119, 52 S.Ct. at 464. Despite this strong language, the Supreme Court later recognized that Swift's language must read in context, "Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in

the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." United States v. United Shoe Machinery Corp., 391 U.S. 244, 248, 88 S.Ct. 1496, 1499, 20 L.Ed.2d 562 (1968).

Thus, the job of a district court after Swift and United Shoe is to look at the particular facts and circumstances of the case to determine whether the modification satisfies the underlying purpose of the decree. The purpose of the initial action was to obtain for borrowers under the Act constitutional procedural due process in foreclosure proceedings. This was the purpose of the consent decree. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Once having learned from judicial decisions that its Act and Regulations are not consistent with constitutional due

process, there is no rational reason why Congress and an agency have to follow the precise procedures established by a consent decree or a judicial decision. If a new statute and new regulations comport with constitutional due process, the Government should be permitted, at least prospectively, to act thereunder. A district court is free to modify the terms of a consent decree when a change in the law brings those terms in conflict with statutory objectives. System Federation No. 91, 364 U.S. at 651, 81 S.Ct. at 373. A change in relevant statutory law -- such as in this case where Congress required that the FmHA ensure by regulation that due process rights are afforded to borrowers and regulations are promulgated in compliance with that mandate -- is a fully adequate basis upon which modification to a consent decree may be based.

This case closely parallels System Federation No. 91, in which the defendant railroad company agreed in a consent decree not to operate "union shops," that is, workplaces in which persons not members of unions would be either excluded or subject to other forms of discrimination. Subsequent to the decree's entry, the Railway Labor Act was amended to permit railroads to negotiate with unions to establish union shops. The railroad moved for modification of the consent decree. The district court denied the motion, noting that the amended act "did no more than make negotiations for a union shop permissive . . . [but] did not prohibit an agreement . . . [that] a union shop should not exist." 364 U.S. at 646, 81 S.Ct. at 370. The Sixth Circuit affirmed, and the Supreme Court reversed. The Court noted that "to continue [the decree] after the

1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union." Id. at 648, 81 S.Ct. at 371-72. The Court emphasized that the change in the Railway Labor Act brought the decree in conflict with the statutory objectives, not in that the Act nullified the decree, but in that the decree prohibited a choice that Congress intended that unions and railroads should possess.

Here the congressional enactment that mandated the establishment of an administrative appeals procedure for the explicit purpose of solving serious due process deficiencies does not conflict with the underlying purpose of the consent decree. Amending the Housing Act so as to resolve due process problems on the

administrative level demonstrates that Congress intended to allow the FmHA to continue to employ, in its discretion and with proper regulations, nonjudicial foreclosure proceedings. The prospective effect of the decree conflicts with the Housing Act by depriving the FmHA of a choice that Congress intended it should be able to exercise. Thus here, as in System Federation No. 91, the parties have no power to continue to insist upon the protection of their rights in a manner different from that chosen by Congress absent constitutional fault. Accordingly, if the FmHA's regulations have properly implemented the command of the statute and comport with constitutional due process, a question for the district court on remand, then the decree should be either vacated or modified so as to permit the FmHA to employ nonjudicial foreclosure proceedings in

Georgia.

VACATED and REMANDED.

COURT OF APPEALS' JUDGMENT
REVERSING DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8094

D.C. Docket No. 176-153

LUCIOUS WILLIAMS, JR., et al.,
Plaintiffs-Appellants,

versus

EARL BUTZ, et al.,
Defendants-Appellants.

Appeal from the United States
District Court for the Southern
District of Georgia

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HAND*, Chief District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United

---

* Honorable William Brevard Hand, Chief U.S. District Judge for the Southern District of Alabama, sitting by

designation.

States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, VACATED; and that this cause be and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that each party [sic] their own costs on appeal.

Entered: May 3, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: JUL 12, 1988

COURT OF APPEALS' ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8094

LUCIOUS WILLIAMS, JR., et al.,
Plaintiffs-Appellees,

Versus

EARL BUTZ, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITIONS FOR REHEARING AND SUGGESTIONS
OF REHEARING IN BANC

(Opinion May 3, 11 Cir., 1988, ____
F.2d ____).

Before RONEY, Chief Judge, HATCHETT,
Circuit Judge, and HAND*, Chief District
Judge.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED

and no member of this panel nor other Judge

* Honorable William Brevard Hand, Chief
U.S. District Judge for the Southern
District of Alabama, sitting by
designation.

in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service

not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

DECISION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION
NO. 176-153

LUCIOUS WILLIAMS, JR., et al.,

Plaintiffs,

v.

EARL BUTZ, individually and in his capacity as Secretary of the United States Department of Agriculture, et al.

Defendants.

ORDER

On October 7, 1977, this Court entered a consent judgment between the parties in this case. That judgment requires the Farmer's Home Administration ("FmHA") to use only judicial foreclosure against borrowers under its rural housing loan

program in Georgia and requires FmHA to give the borrowers notice of the availability of debt relief.

Defendants move to modify the order to allow FmHA to use nonjudicial foreclosure against its borrowers. For the following reasons, defendants' motion will be denied.

DISCUSSION

In 1985, FmHA enacted a series of regulations which provide for internal hearings on all agency decisions to proceed with nonjudicial foreclosure. Defendants contend that these regulations satisfy due process. As a result, defendants argue, the decree issued in this case should be modified to allow nonjudicial foreclosure pursuant to FmHA's new regulations.

The consent decree, however, is not invalid merely because it affords broader relief than this Court could have ordered

at trial. Local 93 v. City of Cleveland, 478 U.S. ____, 92 L.Ed. 405, 425, 106 S.Ct. ____ (1986). The legal force of the decree is animated by the parties' consent to the relief granted. Id. Defendants have submitted no evidence that the decree violates constitutional, statutory or decisional law. Absent such proof, the consent decree remains valid.

Under the Federal Rules of Civil Procedure, this Court retains power to modify the decree if "it is no longer equitable that the judgment should have prospective application." Fed.R.Civ. P. 60(b). A defendant bears a heavy burden to justify modification of a valid consent judgment. Paradise v. Prescott, 767 F.2d 1514, 1527 n. 13 (11th Cir. 1985).

In support of its position, defendant argues that nonjudicial foreclosure would reduce the caseload of the federal courts

and save FmHA time and money. Increased efficiency alone, however, is an insufficient basis for modification of this consent decree.

Reopening a consent decree "'is extraordinary and may only be granted upon a showing of extreme circumstances.'" United States v. Article or Device Consisting of Biotone, 557 F.Supp. 141, 143 (N.D.Ga. 1983), quoting Fox v. Department of Housing and Urban Development, 680 F.2d 315, 322 (3d Cir. 1982). Modification of a consent decree will not be granted in favor of defendant "absent 'a clear showing of grievous wrong evoked by new and unforeseen conditions.'" Paradise, supra, quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932).

Defendant has not shown the kind of extreme, unexpected oppression and hardship which would justify modification of this

Court's decree. See Roberts v. St. Regis Paper Co., 653 F.2d 166, 174 (5th Cir. Unit B 1981). Consequently, defendants are not entitled to modification of the consent decree.

Furthermore, defendants made a free, calculated and deliberate choice to submit to an agreed-upon decree rather than to incur the risks of a litigated judgment. This fact further undercuts any argument that the operation of this decree is inequitable. See Article or Device Consisting of Biotone, supra, at 143.

Accordingly, defendants' motion to modify the order of October 7, 1977, is DENIED.

SO ORDERED, this 9th day of December, 1986.

/s/
CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

CONSENT DECREE OF OCTOBER 7, 1977
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION NO. CV176-153

LUCIOUS WILLIAMS, JR., ALLIE D. WILLIAMS, SUSIE M. COLEMAN (ROSS), EVANS W. GLASS, VIRGINIA W. GLASS, AND MYRA CHANCE OWENS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

EARL BUTZ, Individually and in his capacity as Secretary of the United States Department of Agriculture; J. PAUL HOLMES, JR., Individually and in his capacity as State Director for Georgia, Farmers Home Administration, United States Department of Agriculture; CHARLES E. KILGORE, JR., Individually and in his capacity as Acting State Director for Georgia, Farmers Home Administration, United States Department of Agriculture; LARRY ASKEW, Individually and in his capacity as District Director, Farmers Home Administration, United States Department of Agriculture; ALPHONSO ANDREWS, Individually and in his capacity as County Supervisor, Burke County Georgia, Farmers Home Administration, United States Department of Agriculture,

Defendants.

ORDER AND JUDGMENT

Plaintiffs instituted this action on August 3, 1976, for declaratory and injunctive relief to declare unconstitutional all non-judicial foreclosures of mortgages that have been financed under Section 502 of the National Housing Act of 1949, to enjoin Defendants from foreclosing on mortgages financed under said Section without providing the mortgagors with personal notice and an opportunity to be heard and present defenses in a court of law; to declare that mortgagors in Plaintiffs' class must be informed of the availability of moratorium relief and must be granted the opportunity to apply for said relief before any foreclsoure [sic] action is begun; to enjoin Defendants from foreclosing on mortgages financed under Section 502 of the National Housing Act of 1949 without first

providing the mortgagors with personal notice of the availability of moratorium relief and with an opportunity to apply for said relief.

The Plaintiffs and Defendants, being desirous of implementing a solution to the subject matter of this action without further litigation, the Court having jurisdiction of the parties and subject matter of this action, and the parties herein agreeing and stipulating thereto, and having waived further hearing, now therefore:

By consent of the parties, IT IS HEREBY ORDERED, ADJUDICATED AND DECREED THAT:

1.

The United States of America acting through Farmers Home Administration, United States Department of Agriculture, has now changed its foreclosure policy in the State

of Georgia to require that only judicial foreclosure will be used in Agency (FmHA) foreclosures. The Defendants shall henceforth accomplish foreclosure of rural housing loans, made pursuant to the National Housing Act of 1949, as amended, only through judicial process and by no other means. Specifically, no foreclosures will be accomplished by use of the power of sale procedure.

2.

The parties will attempt in good faith to negotiate reinstatement of the loans as to all individuals who, pursuant to the Class Order dated January 28, 1977, have affirmatively indicated a desire to maintain ownership. The Plaintiffs with the assistance of their attorney will now have an opportunity to meet with Farmers Home officials to attempt to work out a

reinstatement of their loan and the United States acting through the Farmers Home Administration will withhold any judicial foreclosure action for at least forty-five (45) days from the execution of this judgment to allow the Plaintiffs time to work out reinstatement of their loan subject to Paragraph 3 below. As to those individuals to whom a satisfactory reinstatement plan cannot be negotiated, the Defendants may proceed with foreclosure through the judicial process and by no other means.

3.

The United States does not have to wait forty-five (45) days in those cases where the borrowers have abandoned their house and may immediately proceed to process judicial foreclosure in those cases.

There are several cases before this Court in this litigation in which non-judicial foreclosure has been completed and record title is vested in the United States. To facilitate the conclusion of this litigation, the United States of America and Plaintiffs have agreed that an order will issue from this Court revesting the title in the prior owner, the Farmer [sic] Home Administration borrower(s). Unless the borrower then takes action to reinstate his/her loan, the United States will be free to proceed with judicial foreclosure. A copy of the Order of this Court will be recorded in the office of the appropriate Clerk of Superior to remove any cloud on the title as a result of this litigation and issues raised therein. The Plaintiffs in whom title is revested, with the assistance of their attorney, will now

have an opportunity to meet with Farmers Home officials to attempt to work out a reinstatement of their loan; and the United States, acting through the Farmers Home Administration, will withhold any judicial foreclosure action for at least forty-five (45) days from the revesting of title in said borrowers to allow the Plaintiffs time to work out reinstatement of their loan, subject to Paragraph 3 above. As to those individuals to whom a satisfactory plan cannot be negotiated, the Defendants may proceed with foreclosure through the judicial process and by no other means.

5.

To assure that borrowers are given prior notice of the existence of moratorium and interest credit under the Housing Act of 1949, all future borrowers will be provided a letter at loan closing explaining moratorium and interest credit

and strongly recommending that the borrowers make an appointment with the county supervisor to discuss these matters so that they will understand these provisions and when they might qualify to apply for interest credit and/or moratorium. A copy of this letter is attached as Exhibit "A" and made a part of this judgment. Said letter shall be sent forthwith to all mortgagors with currently outstanding rural housing loans.

6.

In addition, the United States agrees that any time a letter is sent to a borrower by the County Office, District Director, or State Office of Farmers Home Administration advising of missed payments or other breaches of the covenants in the loan documents, the following paragraph will be included in that letter:

If you are behind because of something beyond your control, like having less income or unexpected bills, we may be able to help. You may qualify for "Moratorium Relief" which would make it possible for you to miss some payments and still keep your home. Or you may qualify for "Interest Credit" which would make your payments smaller for a while. YOU CANNOT GET "MORATORIUM RELIEF" or "INTEREST CREDIT" UNLESS YOU APPLY FOR IT. Please contact me immediately and let us see if you qualify or if there is something else we can do to help you keep your home.

7.

In addition, the United States agrees pursuant to regulations to be issued on or about October 17, 1977 that County Office personnel during pre-loan approval interviews will inform applicants of the availability of moratorium relief.

8.

This Court shall retain jurisdiction

of this cause for the sole purpose of entertaining a motion to modify this order on the grounds that it, or any part of it, is in direct conflict with a specific holding of the United States Supreme Court, the Fifth Circuit or its successor rendered subsequent to the date of this order.

9.

Representatives of Georgia Legal Services Programs shall take the necessary steps to have all Lis Pendens notices filed during the pendency of this litigation dismissed.

10.

In order to help effectuate the philosophy and policy underlying the increased responsibility of the county supervisors to explain moratorium relief and interest credit to inquiring borrowers, pursuant to this order the State Director (shall take steps) to inform District

Directors, County Supervisors, and Assistant County Supervisors of the changes in policy and practice occasioned by this order.

11.

The above is a complete determination of all the issues in this litigation since, if foreclosure is still recommended by the United States, it will be processed judicially, and each Class member will have the opportunity to raise any legal or equitable defense, including the affirmative defense of their claim to moratorium or interest credit. This judgment cannot be considered a waiver by the United States of any default that may presently exist as to any Plaintiff or other borrower, and by abiding by the restrictions set out herein, the United States may proceed with judicial foreclosure.

12.

The parties will each bear their own costs.

NOTICE OF IMPORTANT RIGHTS

We know that things sometimes happen which are beyond your control, and which may cause you to miss one or more payments. If you believe that something beyond your control is going to make it very hard to make a payment when it is due, you should contact your County Supervisor immediately! You may be eligible for "MORATORIUM RELIEF" or "INTEREST CREDIT".

"MORATORIUM RELIEF", if you qualify for it, makes it possible to miss some of your payments without losing your home. To qualify, your inability to pay must be due to circumstances beyond your control. Also, you must be able to show that, after missing some payments, you will be able to keep up your payments. YOU CANNOT GET "MORATORIUM RELIEF" UNLESS YOU APPLY FOR IT AT THE FARMERS HOME OFFICE.

"INTEREST CREDIT", if you qualify

for it, makes it possible to make smaller payments for a while. Whether you qualify depends on what your income and expenses are. YOU CANNOT GET "INTEREST CREDIT" UNLESS YOU APPLY FOR IT AT THE FARMERS HOME OFFICE.

This Notice does not try to explain all about "Moratorium Relief" and "Interest Credit". You would be very smart to ask your County Supervisor to explain these things to you. You should go and ask for an explanation right away, even if you do not have a problem now. That way, if you ever do have a problem, you will know what to do.

Dated this 7th day of

October, 1977.

/s/
CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Presented by and consented to:

/s/
ROBERT W. CULLEN

/s/
WILLIAM J. COBB

/s/
JOHN L. CROMARTIE, JR.

Attorneys for Plaintiffs

WILLIAM T. MOORE, JR.
United States Attorney

/s/
KENNETH C. ETHERIDGE
Assistant United States Attorney

Attorney for Defendant

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-507

In the Supreme Court of the United States

OCTOBER TERM, 1988

LUCIOUS WILLIAMS, ET AL., PETITIONERS

v.

RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-507

LUCIOUS WILLIAMS, ET AL., PETITIONERS

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RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners chalienge the court of appeals' ruling that the district court must vacate or modify a consent decree if it finds that new administrative regulations, promulgated pursuant to a new statute, fulfill the statutory mandate and protect the due process rights that the decree was entered to protect.

1. The Farmers Home Administration (FmHA) has the power under Section 502 of the Housing Act of 1949, 42 U.S.C. 1472, to authorize housing loans

to persons of low and moderate income in rural areas who cannot otherwise obtain credit at reasonable terms and rates. The FmHA assists borrowers through periods of hardship (see, *e.g.*, 42 U.S.C. 1475), but when it becomes clear that a borrower will not be able to repay the loan and cannot become a successful houseowner, the FmHA accelerates the loan and liquidates the borrower's account (7 C.F.R. 1955.15). In that event, the borrower either must sell the property to a third party and remit the funds to the FmHA or must convey the property directly to the FmHA. If the borrower does neither, then the FmHA forecloses on the debtor's property. See 42 U.S.C. 1480(d).

Prior to 1977, the FmHA in some locales used nonjudicial foreclosure procedures. In 1976, a class of Georgia recipients of Section 502 loans brought suit against the FmHA, claiming that the use of nonjudicial foreclosure procedures violated the Fifth Amendment's Due Process Clause, because such procedures failed to provide the mortgagor with personal notice and an opportunity to be heard and to present defenses (Pet. App. 2d). The FmHA settled the class action in 1977 by agreeing to a consent order that provided that the FmHA would use only judicial foreclosure procedures (*id.* at 3a-4a).

In 1978, Congress amended the Housing Act to require the FmHA to issue regulations giving Section 502 borrowers the right to written notice of the reasons for foreclosure, an opportunity to be heard and to present evidence, and the right to appeal to an authority who has the power to reverse the foreclosure determination. 42 U.S.C. 1480(g). The same year, the FmHA promulgated regulations providing for nonjudicial administrative foreclosure procedures.

Those regulations, which have been amended several times, provide a mortgagor with written notice, a hearing in which the mortgagor can present and contest evidence, and the right to appeal to an impartial hearing officer. See 7 C.F.R. 1900.51-1900.59.

In September 1986, the FmHA, responding to an opinion by the court of appeals (*Johnson* v. *United States Dep't of Agriculture*, 734 F.2d 774 (11th Cir. 1984)), asked the district court to modify the consent decree on the ground that the change in law effected by the 1978 statutory amendment, and the regulations that implemented the command of that amendment, were inconsistent with the consent decree. The district court refused to modify the consent decree (Pet. App. 1c-5c). It reasoned that the consent decree did not violate any "constitutional, statutory or decisional law" (*id.* at 3c) and did not cause extreme and unexpected hardship for the agency (*id.* at 4c-5c).

2. The court of appeals reversed and remanded to the district court (Pet. App. 1a-16a). Explaining that the district court had too narrowly construed its power to modify a consent decree in light of subsequent legislation (*id.* at 6a-9a), the court held that the 1978 amendment to the Housing Act was "a fully adequate basis upon which modification to a consent decree may be based" (*id.* at 12a). The court determined that the statutory amendment conflicted with the consent decree, at least as applied prospectively. It found that the decree deprived the FmHA of a choice between judicial and nonjudicial foreclosure procedures and that Congress, in its amendment to the Housing Act, intended that the FmHA exercise that choice itself, within the constraint of affording mortgagors due process (*id.* at 15a). The court ac-

cordingly remanded the case for the district court to review the FmHA regulations to determine whether they comport with constitutional due process and, if so, to modify the consent decree, at least in its prospective effects, to allow nonjudicial foreclosure (*ibid.*).

3. The decision of the court of appeals does not warrant review by this Court. To begin with, the judgment requires further proceedings in the district court. Under the court of appeals' order, the district court must determine whether the FmHA regulations conform to the requirements of due process. If the district court on remand finds that the regulations are invalid because they fail to meet constitutional standards, the consent decree will remain intact, and the question of when a consent decree may be modied will be rendered moot. Review by this Court at this time would therefore be premature.

On the merits, petitioners do not suggest that the decision of the court of appeals conflicts with any other decision of any other court of appeals, and their challenge presents no issue of general importance. Petitioners do not dispute that the district court erred in failing to acknowledge that it could amend the consent decree based on changes in the law; they contest only the standard for determining when a change in law permits modification of a consent decree and whether the statutory amendment in this particular case meets that standard. But the latter issue is a narrow one, and contrary to petitioner's suggestion (Pet. 22-25), there is no troubling lack of clarity in the standard that governs what type of change in law supports a modification of a consent decree. In *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651-652 (1961), the Court ruled that, if the statute and objectives on which the consent de-

cree was based are changed, the district court must be free to conform the decree to the new statute. That standard has not caused notable difficulties in application (see *Williams* v. *Atkins*, 786 F.2d 457 (1st Cir. 1986) (vacating a consent decree where changes to the Food Stamp Act undermined the statutory basis of the decree); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 968-971 (2d Cir. 1983) (discussing the standard for modifying a consent decree), cert. denied, 464 U.S. 915 (1983)); and there is no need for the Court to revisit the standard in order to protect the "worth and solemnity" of judicial decrees against the unchallenged power of Congress to redirect public policy (Pet. 23).

In any event, *System Federation No. 91* makes clear that the decision of the court of appeals is correct. In that case, a railroad employer had agreed by consent decree not to run a "union shop"—a workplace in which discrimination against or exclusion of nonunion members is permitted. Following the consent decree, Congress amended the Railway Labor Act, 45 U.S.C. 151 *et seq.*, to permit railroads to negotiate with unions about whether or not to have union shops. This Court held that the consent decree had to be modified; the Court explained that a change of law had rendered it "in conflict with the statutory objectives" (364 U.S. at 651) because the decree prohibited a choice that Congress intended that unions and railroads should have the power to make (*id.* at 648-653).

The present case is directly analogous to *System Federation No. 91*. There, the employer through a consent decree gave away its power to decide whether to run a union shop, but a subsequent statutory

amendment contemplated that the employer would have the power to decide that question (in conjunction with the union). Here, the FmHA through a consent decree gave up its power to foreclose through nonjudicial means, but the subsequent statutory amendment contemplated that the FmHA would have the power to choose between judicial and nonjudicial foreclosure procedures that meet certain statutory requirements. See 42 U.S.C. 1480(g) (granting the Secretary the power to issue procedural rules meeting certain requirements, not including a requirement of judicial foreclosure).* Just as in *System Federation No. 91*, the consent decree in this case deprived one party of authority that Congress later decided that it should have and so was inconsistent with statutory objectives.

Modification of the consent decree (if due process requirements are met by the new FmHA regulations) not only would bring the decree into line with statutory policy; it would impose no burden on petitioners and would leave the decree fully effective to fulfill its purposes. The decree was entered in order to guarantee the class members that the FmHA would abide by the requirements of due process in foreclosure actions. If the district court concludes that the regulations meet due process standards—which is the precondition for modification, as the court of appeals held (Pet. App. 15a)—the fundamental purpose of the consent decree will be fulfilled even if the decree is modified to permit the FmHA to use non-

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* As petitioners note (Pet. 9, 17-18), Congress was made aware of the present lawsuit in 1977. Although the consent decree providing for judicial foreclosure procedures was entered prior to the enactment of the 1978 amendments, Congress did not include any such requirement in the statute.

judicial foreclosure procedures. Accordingly, modification of the consent decree in the circumstances specified by the court of appeals would be a proper exercise of the inherent equity power to adapt a consent decree to changed circumstances, including changes in law. See *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976); *System Federation No. 91* v. *Wright*, 364 U.S. at 647; *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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Supreme Court, U.S.
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NO. 88-507

IN THE

Supreme Court of the United States

October Term, 1988

LUCIOUS WILLIAMS, et al.,

Petitioners,

vs.

RICHARD E. LYNG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents urge denial of the Petition For Writ of Certiorari by arguing both that review by this Court is premature and that the petition presents no issue of importance. Examination of Respondents' presentation, however, reveals that this Petition timely presents a question, important enough to be decided by this Court, concerning the relationship between an equitable decree entered by the federal

judiciary and subsequent Congressional activity.

1. Respondents note the possibility that the questions presented here might be rendered moot if petitioners prevail on certain remaining constitutional issues not now before this Court, and claim that this hypothetical possibility renders consideration of the issue raised by the Petition premature. (Mem.4) Yet, as Respondents well know, this instant Petition is the sole opportunity, ever, for the petitioners to challenge the court of appeals' judgment on the issue now before the Court, an issue which might ultimately prove controlling, as easily as it might prove moot.

In urging this Court to cast aside as "premature" the petitioners' only opportunity for favorable resolution of a potentially dispositive issue, respondents demonstrate that they still possess the same

attenuated sense of due process which led to the very decree they now seek to cast aside. Respondents' grasp at this straw suggests, moreover, a measure of urgency which belies their posture that this case presents no matter of consequence.

2. The linchpin in both the court of appeals opinion and the respondents' present argument on the merits is the contention that Congress, by 42 U.S.C. §1480(g), empowered the FmHA to choose between judicial and non-judicial foreclosure. Like the appellate panel before them, respondents have been unable to support that contention with even a single word of statutory text or legislative history.

On the other hand, respondents do attempt, though unsuccessfully, to remedy a key deficiency in the court of appeals opinion by now offering a purported explan-

ation for the conclusion that Congress intended FmHA discretion. Respondents' conclusion rests, as we are twice told (see Mem. 6), on the fact that Congress "did not include" a requirement of judicial foreclosure in the 1978 amendments. Thus, because the 1978 amendments are in fact totally silent on the issue of judicial or non-judicial foreclosure, respondents take their stand in a legislative vacuum.

There is, however, simply no basis for concluding that Congress's forbearance reflects anything other than Congressional indifference on the specific question of judicial versus non-judicial foreclosure. On the other hand, respondents' method of attributing meaning to Congressional inaction would have the net effect of requiring Congress to have acted affirmatively even to have preserved the status quo under the consent decree. That

approach respects neither Congress's authority to determine for itself the subjects on which it will legislate nor the corollary that Congress can justifiably rely that public policy will not be changed in Congress's own name without Congressional action. See generally, H. Hart and A. Sachs, The Legal Process: Basic Problems In The Making And Application of Law 1394-1401 (tentative ed. 1958).

Furthermore, and quite apart from the burdens which respondents' approach would cast on Congress, the extraction of meaning from legislative inaction is necessarily a treacherous course. The sounds of silence on which respondents rely differ pointedly from the statutory amendment which "in the clearest terms" supported modification of the consent decree in System Federation No. 91 v. Wright, 364 U.S. 642, 648 (1961). Unlike the clear signals in System Federa-

tion, imagined emanations from the void are hardly an adequate basis for a judicial body to deem its solemnly adjudicated decree to have been overruled by subsequent Congressional action. Instead, to protect both the legislative and judicial functions, this Court should declare that an equitable decree may not be modified in the name of Congress until Congress has given an affirmative, clear, and convincing signal of a relevant change in public policy.

Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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